Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term 1999

GEORGE E. KERSEY,

PETITIONER

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION

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QUESTIONS PRESENTED FOR REVIEW

This Petition presents the following questions:

1. Whether Petitioner's Unemployment Appeal in the State Court was improperly removed to the District Court (No. 97-11401) only after a default occurred in the State Court?

2. Whether Defendants are in default in the Federal Court by failing to respond to the complaint in Appeal 98-599 after it was served?

3. Whether Defendants are in default in the District Court by failing to serve Petitioner's on September 2, as ordered by the District Court?

4. Whether the Motion to dismiss Stanton E. Collier and Brian L. Kessler as party defendants was properly granted?

5. Whether Petitioner's EEOC complaint was improperly dismissed because the EEOC failed to advise him of the constructive receipt doctrine?

6. Whether Petitioner's State and Common Law Claims are preempted by any Federal Statue?

7. Whether the CSRA (Civil Service Reform Act) does not apply to Petitioner's because he was excluded from its coverage as a provisional employee ?

8. Whether the FTCA (Federal Tort Claims Act) bars Petitioner from recovering for torts committed by Federal officers acting outside of their official capacities?

9. Whether a cause of action exists against Petitioner's former supervisors for violation of Petitioner's rights guaranteed by the Constitution and the Laws?

LIST OF PARTIES

1. GEORGE E. KERSEY, Petitioner

2. SHEILA E. WIDNALL, SECRETARY DEPARTMENT OF THE AIR FORCE, STANTON E. COLLIER and BRIAN L. KESSLER, Respondents

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IN THE
SUPREME COURT OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioner respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in its case Nos. 98-1597, 98-1598 and 98-1599. A decision by the Court of Appeals affirming a decision by the District Court granting a motion for summary judgment was entered December 10, 1999.

OPINIONS BELOW

The opinion of the Court of Appeal is Per Curiam and unreported. The Per Curiam opinion is reprinted in the Appendix to this Petition commencing at page 1a. The Court of Appeals affirmed a decision of the District Court which is reprinted commencing at page 5a.

JURISDICTION

This Court has jurisdiction over the judgment entered December 10, 1998 by virtue of 28 U.S.C., Section 1254 (1).

THE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution, Amendments V and 14
"No person shall ... be deprived, of life, liberty or property, without due process of law "

28 USC 1254 (Courts of appeals; certiorari; appeal; certified questions) 3

28 USC 2679(d) (CSRA) 14, 16-19, 27

28 USC 2680(b) (FTCA) 14, 19-20, 25-26

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Age Discrimination in Employment Act (ADEA) 29 U.S.C. Sec. 633a 19

STATEMENT OF THE CASE

This is an action for wrongful dismissal of Petitioner's age discrimination claim by the EEOC, together with pendent State and Constitutionally related causes of action.

Defendants wrongfully claim that Petitioner's State and Common-Law claims challenging his discharge are preempted by the Age Discrimination in Employment Act, the Civil Service Reform Act and the Federal Tort Claims Act.

An appeal was taken to the Court of Appeals from the decision of the District Court in granting Defendants' motion for summary judgment. In a Per Curiam decision the Court of Appeals summarily affirmed the District Court judgment essentially for the reasons stated in its memorandum of decision, and added that the Petitioner was not prejudiced by a delay in responding to the Order of the District Court, notwithstanding that the dismissal of the EEOC case was based on an alleged delay and without giving Petitioner the benefit of the constructive receipt doctrine. In addition, the Court below ignored the wrongful removal from the State Court

STATEMENT OF THE CASE (Cont)

after the required deadline for answer had expired and also ignored the fact that no answer was ever filed in Case 98-1599.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the Court of Appeals made the following errors:

1. It wrongly affirmed the dismissal of the EEOC case based on an alleged delay and without giving Petitioner the benefit of the constructive receipt doctrine.

2. In addition, the Courts below ignored the wrongful removal from the State Court after the required deadline for answer had expired and also ignored the fact that no answer was ever filed in Case 98-1599.

SUMMARY OF ARGUMENT

DEFENDANTS ARE IN DEFAULT IN BOTH FEDERAL AND STATE COURTS. PETITIONER'S EEOC APPEAL IS NOT PROCEDURALLY DEFECTIVE BECAUSE THE APPLICABLE LAW WAS NOT APPLIED, INCLUDING THE CONSTRUCTIVE RECEIPT DOCTRINE, AND HIS STATE, CONSTITUTIONAL AND COMMON LAW CLAIMS ARE NOT PREEMPTED. PETITIONER HAS BEEN DEPRIVED OF DUE PROCESS.

I. DEFENDANTS IN DEFAULT IN THE STATE AND FEDERAL COURTS BY REMOVING THIS ACTION FROM THE STATE COURT AFTER THE DEADLINE FOR RESPONSE IN THE STATE COURT HAD EXPIRED AND BY FAILING TO SERVE THEIR RESPONSE ON THE DATE ORDERED BY THE DISTRICT COURT

The Defendants Sheila E. Widnall, Secretary of the Air Force, Stanton E. Collier and Brian L. Kessler (collectively, the "Defendants") are in default. The defendants failed to remove this case to the Federal Court before the deadline for answer in the State Court had expired and they failed to make their motion for summary judgment within the time ordered by the District Court.

Not only have the Courts below have ignored the failure to make a timely removal of the case to the Federal Court, but also the Court of Appeals has ignored the failure by the Defendants to make a timely motion for summary judgment on the ground that Petitioner has not been prejudiced. What could be more prejudicial to the Petitioner to have his action dismissed on the merits?

Moreover, this is a case where Petitioner's EEOC appeal was dismissed because of an alleged late filing. If Petitioner can be dismissed because of a late filing, the same should apply to the-defendants.

II. PETITIONER'S CLAIM OF AGE DISCRIMINATION IS NOT BARRED BY FAILURE TO COMPLY WITH THE PROCEDURAL REGULATIONS

While defendants wrongly terminated Petitioner from employment because of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Sec. 633a, the matter of age discrimination is only one minor aspect of Petitioner's case which is based primarily upon harassment, defamation, false accusation of engagement in illegal activities and assault, retaliation, wrongful discharge, as well as other intentional torts which are apparent from the Petitioner's statement of facts which a part of the Record in this case.

With respect to age discrimination, Petitioner chose to pursue an administrative remedy, and sought to comply, in a timely manner, with the regulations governing the filing and

processing of administrative complaints.

An administrative failure does not bar a subsequent civil action based on defendants' alleged discriminatory acts, but an ADEA plaintiff who elects to pursue an EEOC complaint is required to exhaust his administrative remedies before filing suit in federal court, and that is precisely what Petitioner has done. Tsai v. Helfer, 940 F. Supp. 597, 599-601 (S.D.N.Y. 1996).

Defendants emphasize that Petitioner did not file his Complaint of Discrimination with the Chief EEO Counselor at Hanscom within 15 days, i.e., "until November 25, 1995" [sic-16-1996] -- seventeen days after the date on which the Notice of Final Interview had been received at the specified address, but not received by him.

On that basis, the administrative complaint was dismissed as untimely, and the dismissal subsequently affirmed by the EEOC. However, after the dismissal was received, plaintiff was notified by the EEOC that he could pursue the matter in the federal court.

It is acknowledged that the Commission has held that a rebuttable presumption of constructive receipt is created by receipt of a document at a complainant's correct address by a member of the complainant's family or household of suitable age and discretion. Fontanella v. General Services Administration, 1995 WL 230518; EEOC Request No. 05940131; Appeal No. 01933567 (April 10, 1995).

HOWEVER, FONTANELLA ALSO HAS HELD THAT "WHEN AN AGENCY ELECTS TO DISMISS A COMPLAINT ON TIMELINESS GROUNDS, RELYING ON A CERTIFIED RECEIPT SIGNED BY AN INDIVIDUAL OTHER THAN THE COMPLAINANT, IT SHALL ADVISE THE COMPLAINANT IN ITS FINAL AGENCY DECISION OF THE SUBSTANCE OF THE CONSTRUCTIVE RECEIPT DOCTRINE AND THAT IT IS RELYING UP[ON THAT DOCTRINE TO DISMISS APPELLANT COMPLAINT AS UNTIMELY.

In the present case the Notice was not received by a member of appellant's household. AT NO TIME DID THE AGENCY EVER INDICATE TO APPELLANT THAT IT WOULD RELY ON THE SUBSTANCE OF THE CONSTRUCTIVE RECEIPT DOCTRINE. On this basis alone the dismissal was improper.

The date on which Plaintiff personally received the Notice of Final Interview was November 14, 1995 or 6 days after the alleged constructive receipt on November 8, 1995. If Plaintiff had been advised of the constructive receipt doctrine he could easily have filed by November 23rd, instead of his actual filing-- based on his date of "actual receipt"-- on November 25 complaint was timely filed.

In addition the EEOC decisions interpreting the phrase "receipt of notice" do not apply here. The EEOC has ruled that receipt by a member of the complainant's family or household, if the complainant designates his residence as his address of record, or by an agent at the complainant's place of work, if the complainant designates his workplace as his address of record.

In the present case, the document was not received by a member of Petitioner's household, nor was it received by an agent at his place of work.

Moreover, Petitioner was never advised that if he "believed that there could be a problem with the timely receipt of documents mailed to that address, to arrange with the Commission for alternative methods of delivery: i.e., a different address or a restricted delivery service.

Where the complainant has not been advised of the possibility of alternative methods of delivery, that is a sufficient excuse for alleged noncompliance with regulatory deadlines.

Here, since the Notice was sent by Certified Mail requiring a return receipt, the EEOC could easily have restricted delivery to the addressee, but failed to do so.

The requirement that action be taken within a deadline makes it important that the addressee have actual notice.

Defendants argue that if a complainant could simply fail to acknowledge receipt of a registered letter at the address that he himself provided to the agency, or routinely claim delay between the date of delivery and the date of his

"actual" receipt, he could "'handily defeat the strict time limits set by the statue and the regulations,' and create an unworkable administrative scheme." By requiring restricted delivery, the agency can insure that proper notice is given.

It is irrelevant that, as stated by the defendants "in an analogous context and for precisely the same reason, the Federal Rules of Civil Procedure make clear that non-receipt of a document does not affect the validity of service under Rule 5(b). Under this theory, service takes effect upon mailing so that actual notice would be irrelevant and there would be no need to send documentation by certified mail requesting a return receipt.

The defendants have rejected as false Petitioner's assertion that the address was incomplete because he had "carefully instructed" the Air Force to include the designation "care of" as part of the address. Petitioner's position is supported by Exhibit A attached to his Declaration in the Record of this case.

In any event, the fact that the certified mail receipts demonstrate that all mailings went to the same place and were signed for by the same person -- J. Annese -- irrespective of whether they had a "c/o" designation or not is irrelevant because Petitioner had not authorized J. Annese to sign for the documents, and did not have an office there.

In the alternative, Petitioner is entitled to invoke the doctrine of "equitable tolling". It is acknowledge that the EEOC's regulatory time limits are subject to equitable tolling. Petitioner has put forth numerous grounds, set forth above, that would justify overturning the EEOC's refusal to invoke the doctrine of equitable tolling here.

To warrant equitable tolling on the facts at issue here, defendants claim there would need to be either: (a) an affirmative misrepresentation sufficient to trick or induce Petitioner to miss the applicable filing deadline, or (b) circumstances outside Petitioner's control that prevented him from

filing an administrativecomplaint within the prescribed time limit.

The EEOC Regulations permit the agency to extend the time limits in accordance with Sec. 1614,604(c), which provides "THE TIME LIMITS IN THIS PART ARE SUBJECT TO WAIVER, ESTOPPEL AND EQUITABLE TOLLING". Surely there is a waiver when the agency neglects to advise that the Notice will be sent by Certified Mail for which a signature is required. Surely there is an estoppel when the agency could have sent its Notice by "Restricted Delivery" to be assured that Petitioner would have received it personally, but neglected to do so. Surely there is equitable tolling where an agency chooses to rely on the Constructive Receipt Doctrine without notifying the appellant.

In any event the address where Petitioner directed that his mail be sent with the specific designation "c/o" was <u>not his place of work</u>.

In this case, Petitioner did not identify his work place as his address of record, <u>because he had lost his employment</u>. He indicated a law firm address as the place where the Notice was to be sent, but it was <u>not received by his employee</u>.

Instead, if the Notice had been addressed as requested, it would have been called to Petitioner's attention. Instead the agency sent the Notice without addressing it as Petitioner had requested, without advising him of the constructive receipt doctrine, and without taking the available remedy, plainly indicated on a Return Receipt for Certified Mail of restricting delivery.

Petitioner is believed to have presented adequate justification, pursuant to 29 C.F.R. Sec. 1614.604(c), which provides that the time limits are subject to WAIVER, ESTOPPEL AND EQUITABLE TOLLING, to indicated that the dismissal of Petitioner's complaint as untimely was improper and should be REVERSED.

III. PETITIONER'S STATE, CONSTITUTIONAL AND COMMON LAW CLAIMS ARE NOT PREEMPTED BY FEDERAL STATUTE

The complaint includes claims for violation of State, Constitutional and Common La rights.

As demonstrated below, none of these claims is preempted by the Age Discrimination in Employment Act, the Civil Service Reform Act ("CSRA") or the Federal Tort Claims Act ("FTCA").

A. THE STATE, CONSTITUTIONAL AND COMMON LAW CLAIMS ARE NOT PREEMPTED BY THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

This act provides an exclusive remedy for federal employees alleging age discrimination. While it preempts all claims arising out of or relating to age discrimination, Many of Petitioner's claims do not involve age discrimination. Defendant Collier admitted that he wanted to fire Petitioner because of alleged and unproved "illegal acts", such as unauthorized use of a fax machine or the commission of an assault has nothing to do with age discrimination. A Count related to Defendants' discriminatory decision to terminate constitutes intentional interference with an advantageous economic relation.

In Purtill v. Harris, 658 F.2d 134, 137 (3rd Cir. 1981) a former federal employee had filed administrative actions, but nevertheless contended that he also was entitled to a remedy

based on the Constitution. The Court held merely that it was necessary to exhaust administrative remedies.

In Purtill the claim of retaliatory harassment in violation of the 5th Amendment was barred because of the availability of Civil Service remedies.

In the present case Petitioner, as a provisional employee had no Civil Service remedy. In Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), there was a request for legal and equitable relief directly under the Constitution.

In Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) the Court noted that "Bivens established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.

In Bush v. Lucas, 647 F.2d 573, 576 (5th Cir. 1981) on remand from 446 U.S. 914, 100 S.Ct. 1846, 64 L.Ed.2d 268 (1980) "the court reaffirmed

its position that in the light of available civil service remedies a federal employee has no cause of action for damages under the first amendment for retaliatory demotion." (Emphasis added).

As noted above, Petitioner, as a provisional employee had no Civil Service remedy.

The counts for failure to provide a professional work environment and breach of a covenant of fair dealing are not preempted. Each is based on wrongful acts committed by defendant Collier and implicitly "ratified" or Acquiesced in" by Defendant Kessler.

While Collier had expressed a preference for younger employees, it would appear that Collier was primarily interested in removing Petitioner as a competitor for the vacant position of Chief.

On the basis of Purtill and related cases the counts are separate and distinct claims, each based on different wrongful acts.

B. PETITIONER'S STATE, CONSTITUTIONAL AND COMMON LAW CLAIMS ARE NOT PREEMPTED BY THE CIVIL SERVICE REFORM ACT (CSRA)

The protections afforded by this act do not apply to Petitioner, as has been acknowledged by the defendants.

Congress enacted the CSRA to provide a comprehensive framework for personnel policies governing federal employees and provide an exclusive remedy for most government employee complaints of prohibited personnel actions. Roth v. United States, 952 F.2d 611, 614-16 (1st Cir. 1991) holding that the CSRA provides a comprehensive framework for personnel policies governing federal employees.

"The prohibited personnel practices include "personnel actions" that transgress the law's merit system principles-merit system principles which require the federal sovereign to treat its employees fairly and shield them from capricious actions, personal vendettas, favoritism, and the like."

As stated in Berrios v. Department of the Army, 884 F.2d 28, 30-32 (1st Cir. 1989), "where the CSRA pertains, defamation claims touching upon prohibited personnel practices are prohibited."

The exclusivity of the CSRA bars both state and common law claims only where it pertains. Because Petitioner was "provisional" he can challenge his dismissal since his removal from employment did not constitute a "personnel action" covered by the CSRA.

Similarly, to the extent Petitioner alleges retaliatory conduct that occurred prior to his dismissal, such incidents also relate to personnel actions that are not encompassed by the CSRA's exclusive remedial scheme, since Petitioner did not have Civil Service remedies. The fact that Defendant Collier unjustifiably discredited Petitioner's work, complained about his attendance, changed his scheduled work day, refused to give him credit for work that he had performed, gave him a false and unfairly critical evaluation and withheld pay for services that had been rendered may be personnel actions taken by a supervisor. But they are not preempted by the CSRA because Petitioner, as a provisional employee was not under the CSRA. It was acknowledged that Petitioner lacked standing to file a grievance with the Merit Systems Protection Board.

C. PETITIONER'S PETITIONER'S STATE, CONSTITUTIONAL AND COMMON LAW CLAIMS ARE NOT PREEMPTED BY THE FEDERAL TORT CLAIMS ACT (FTCA)

Defendants contend, finally, even if the tort claims are not preempted by ADEA and the CSRA, they are barred by the FTCA because the United States has sovereign immunity so that such claims cannot be asserted.

Defendants state that tort claims involving the acts or omissions of the United States or any of its agents acting in their official capacities can only be brought under the FTCA with United States as the proper party. However, the tort claims asserted in this case are specifically barred from assertion against the United States because of sovereign immunity.

Because Petitioner never filed an administrative claim with the Air Force under the FTCA, defendants have claimed that there is no jurisdiction over his tort claims, which, in any event, are exempted from the FTCA's waiver of sovereign immunity. Why would Petitioner file an administrative claim in relation to claims which cannot be asserted against the United States?

The FTCA specifically exempts certain types of claims from its waiver of sovereign immunity, including claims arising our of "libel, slander, misrepresentation, deceit or interference with contract rights . . ." 28 U.S.C. Sec. 2680(h).

Counts II and III of Petitioner's Complaint rely upon such allegations. They accordingly are said to barred from assertion against the United States, but that does not mean the claims cannot be asserted against the individual defendants.

It is irrelevant that the Attorney General has certified that the defendant employees were acting within the scope of their office or employment since Constitutional violations are being alleged.

Under the Federal Employee's Liability Reform and Tort Compensation Act of 1988 the determination of the Attorney General is conclusive only for removal and not for substantive purposes and the Court is permitted to receive evidence and determine whether the challenged conduct was within the scope of

employment. Martin v. Merriday, 706 F. Supp. 42 (N.D. GA. 1989).

In Adams v. Jackel, 220 F. Supp. 764 (D.C. N.Y. 1963) the certificate of activity within the scope of employment was insufficient to exonerate an employee, who commits tort, to establish with finality actions within the scope of employment and an hearing on motion to remand might refute the certificate. Similarly, a determination of whether defendants were acting within the scope of employment was for the court to make in accordance with traditional guarantees of due process. Gogek v. Brown University, 729 F. Supp. 926, (D.R.I. 1990).

In addition, a plaintiff may challenge the certification. Green v. Hall, 8 F.3d 695 (9 Cir. 1993). Mandamus is appropriate in a defamation action to challenge scope of employment. Aliota v. Graham, 984 F.2d 1350 (3rd Cir. 1993), cert. den. 114 S. Ct. 68, 126 L.Ed.2d 37. If the District Court finds that the employee was not acting within the scope of employment, the action must be remanded

to the state court where it is recommenced against the accused in his individual capacity.

Where an army major told his secretary that he wanted a sexual relationship with her and caressed her, these actions were not within the scope of employment, so the secretary could maintain an action against the major. Wood v. U.S., 760 F. Supp. 952 (D. Mass. 1991), affd. 995 F2d 1122. The inquiry as to whether actions are within the scope of employment depends upon whether the actions are so related to the discharge of official duties that prospect of personal liability for such actions would inhibit proper performance of those duties. Gogek v. Brown University, supra.

Although certification is prima facie evidence, it is not conclusive and if facts can be determined without an evidentiary hearing, the court can rule on a pretrial motion to substitute or set aside the certification based on pleadings, documentary evidence and affidavits; if there is a genuine issue of material fact, the court should permit discovery and conduct any necessary hearing. Schrob v. Catterson, 967 F.2d

929 (3rd Cir. 1992). The context of the alleged acts is relevant to determining the scope of employment and is to be determined by the District Court after an appropriate factual hearing. McHugh v. University of Vermont, 996 F.2d 67 (2nd Cir. 1992).

In Baggio v. Lombardi, 726 F. Supp. 922 (E.D.N.Y 1989) an evidentiary hearing was required to determine whether employees were acting within the scope of their employment at the time of allegedly improper surveillance activities. The determination of an employee's actions involves questions of law and fact, but the determination of scope of employment is a question of law reviewable de novo. Johnson v. Carter 939 F.2d 180 (4th Cir. 1991), on reh. 983 F2d 1316, Cert. den. 114 S.Ct. 57 126 Led. 2d 27.

The Attorney General's determination of whether a federal employee was acting within the scope of his employment is subject to review by the Court. Snodgrass, v.Jones, 957 F.2d 482 (7 Cir. 1992); Hamrick v. Franklin, 931 F.2d 1209 (7th Cir. 1991), cert den. 112 S.Ct. 200, 116 Led.2d 159.

The intentional tort exceptions to the Federal Tort Claims Act are interpreted according to Federal Law. Santiago-Remirez v. Secretary of Dept. of Defense, 984 F.2d 16, (1st Cir. 1993). The question of whether a cause of action is one of tort or contract is determined by state law. Misany v. U.S., 826 F.2d 512 (7th Cir. 1987).

The determination of whether a tort claim is excepted from the government's consent to be sued depends upon the law of the state where the incident occurred. Lambertson v. U.S., 528 F.2d 441, (2nd Cir. 1976), cert. den. 96 S.Ct. 2627, 426 U.S. 921, 49 L.Ed.2d 374.

The intentional tort exception to the Federal Tort Claims Act does not apply to torts that are outside the scope of the general waiver. Sheridan v. U.S., 108 S.Ct. 2449, 487 U.S. 392, 101 L.Ed.2d 352 (1988). Thus, claims against the United States for libel, slander, misrepresentation, deceit or interference with contract are excluded from the FTCA. Baca v. U.S., 467 F.1d 1061 (10th Cir 1972).

A tort claim based on misrepresentation, deceit or interference with contract is excluded

from the FTCA. U.S. v. Berk & Berk, 767 F. Supp. 593 (DNJ 1991). Also excluded are intentional and legally unauthorized wrongs committed by government agents. Avery v. U.S., 434 F. Supp. 937 (DC.Conn 1977).

Indeed, when Congress made a statutory exemption for intentional torts it had upper most in mind the Common Law torts. Moffitt v. U.S., 430 F.Supp. 34, (D.C.Tenn 1976).

The complaint of an Air Force officer sounding in defamation, assault, battery, false imprisonment, misrepresentation, deceit and interference with contract stated no actionable claim against the United States. Gamage v. U.S., 217 F. Supp. 381 (D. Cal. 1962).

In summary, the FTCA does not apply to claims of defamation, libel, slander, injury to reputation, product disparagement, invasion of privacy, emotional distress, fraud, false representation, deceit, interference with contract rights, abuse of process, malicious prosecution.

In fact, Sec. 2680 specifically exempts from Chapter 171 (Tort Claims Procedure) (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, with an exception for investigative or law enforcement officers of the United States.

IV. A CAUSE OF ACTION EXISTS AGAINST THE SUPERVISORS

In addition to the Secretary of the Air Force, Petitioner has named as defendants two of his former supervisors, Stanton E. Collier and Brian L. Kessler, in their individual capacities. This attempt to impose liability against his former supervisors in their personal capacities is proper as a matter of law, as an otherwise unprotected violation of plaintiff's rights under the Constitution.

The Westfall Act which provides a federal employee with immunity from certain tort actions only applies if the suit arises out of actions performed "within the scope" of the defendant

employee's "office of employment." 28 U.S.C. 2679(d)(1). Immunity which attaches upon the filing by the Attorney General or delegate of a certificate is rebuttable.

VI. CONCLUSION

The defendants are in default for failing to answer the complaint after it was served and for failing to make timely service of their earlier motion for dismissal.

Additionally, Petitioner has not been afforded fair treatment by the dismissal of his case allegedly for being late in filing his administrative EEOC complaint when he was not given Notice of the Constructive Receipt Doctrine, and was not granted the tolling to which he was entitled.

In any event Petitioner is entitled to proceed on his State, Common Law and Constitutional claims.

The decision of the District Court and the Court of Appeals should be reversed.

Respectfully submitted,

George E. Kersey
P.O. Box 836
Lynnfield, MA 01940
(781) 581-5103

Dated: March 7, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney(s) of record for each other party by mail on March 10,1999.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1597

GEORGE E. KERSEY,
Plaintiff, Appellant,

v.

UNITED STATES AIR FORCE, ET AL.,
Defendants, Appellees.

Nos. 98-1598
98-1599

GEORGE E. KERSEY,
Plaintiff, Appellant,

v.

SHEILA E. WIDNALL, ET AL.,
Defendants, Appellees.

JUDGMENT
Entered: December 10, 1998

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court
PHOEBE MORSE

Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

APPENDIX
-2a-
[NOT FOR PUBLICATION--NOT TO BE CITED
AS A PRECEDENT]
UNITED STATES COURT OF APPEALS
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Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. George A. O'Toole,Jr., U.S. District Judge]

Before

Selya, Stahl and Lynch]
Circuit Judges

George E. Kersey on brief pro se.
Donald K. Stern, United States Attorney and
Michael J. Pineault, Assistant U.S. Attorney
on brief for appellee

Per Curiam. We have reviewed carefully the record in this case, including the briefs of the parties and the memorandum and order of the district court. We affirm the grant of summary judgment to the defendants/appellees essentially for the reasons given by the district court in its memorandum and order, dated March 12, 1998. We add only the following brief comments.

Even if we assume arguendo that defendants/appellees served their motion to dismiss one day late, Kersey has not alleged any prejudice from the delay. Thus, the district court was well within its discretion in considering the motion. See Coughling v. Tailhook Ass'n Inc., 818 F. Supp. 1366, 1368 (D. Nev. 1993) (court will consider motion to dismiss since filing one day late did not prejudice plaintiff).

We find no error in the decision by the EEOC to dismiss Kersey's complaint without having informed him beforehand of its reliance on the doctrine of constructive receipt Moreover, since the Notice of Final Interview was delivered to the address Kersey provided and was received by

an individual of suitable age and discretion, Kersey has not raised any issue which might rebut the failure by the agency to inform him of its reliance on the doctrine prior to his final appeal.

Finally, Kersey has not alleged any facts which show that the actions which form the basis of his complaint were performed by his supervisors outside of the scope of their employment. Hence, no cause of action exists against them in their individual capacities.

Affirmed. See 1st Cir Loc. R. 27.1

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NOS.
97-10464-GAO
97-11401-GAO
97-10478-GAO

George E. Kersey
Plaintiff

v.

SHEILA E. WIDNALL, Secretary Department of the Air Force; STANTON E. COLLIER and BRIAN L. KESSLER,

Defendants

MEMORANDUM AND ORDER
March 12, 1998

O'TOOLE, D.J.

These actions arise out of the termination of the plaintiff employment as a civilian patent attorney for the United States Air Force at Hanscom Air Force Base in Bedford, Massachusetts. Kersey filed three separate actions, Civil Action No. 97-10464-GAO (Case I); 97-11401-GAO (Case II); and 97-11478-GAO (Case III), alleging various violations of federal and state statutory and common law. The defendants have moved to dismiss all counts of all the complaints pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(5), and 12(b)(6). Construing their motion as one for summary judgment, the Court, for

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When the court relies in part on materials outside of the pleadings in reaching its decision, as it does here, it should treat the motion to dismiss as one for summary judgment. See Dominque v. Weld, 73 F.3d 1156, 1158-59 (1st Cir. 1996); Smith v. Massachusetts Dep't of Correction, 963 F.2d 1390, 1394 (1st Cir. 1991).

the reasons set forth in this memorandum, allows it and orders judgment to be entered in favor of the defendants.

BACKGROUND

For present purposes, the Court draws all reasonable inferences from the record in the light most favorable to the nonmoving party Fennell v. First Step Designs, Ltd. The following facts, stated favorably to the plaintiff, will be taken as true.

Kersey began working as a civilian patent attorney at Hanscom Air Force Base in March, 1995, as a probationary employee. His employment was terminated effective October 2, 1995. The defendant Collier, who is the Acting Chief of the Patents Section, and the defendant Kessler, who is a Staff Judge Advocate at Hanscom and Collier's direct superior, participated in the decision to discharge Kersey.

After his termination, Kersey filed an application for unemployment compensation benefits with the Massachusetts Department of Employment and Training ("DET"). He also initiated contact with an Equal Employment Opportunity ("EEO") counselor at Hanscom. On October 26, 1995, he completed and signed an EEO Initial Interview Form, asserting that he had been discharge because of his age. He listed his mailing address as, 230 Broadway, Lynnfield, MA 01940. That is the address of a law firm Bernstein, Golder & Miller. Although the firm neither represented nor employed the plaintiff, it apparently had agreed to receive and hold his mail for him.

On November 7, 1995, EEO Counselor Naomi Cherny sent a Notice of Final Interview (NOFI") to Kersey by certified mail, return receipt requested, informing him that if he wished to file a formal EEO complaint, he must do so within fifteen days after receipt of the NOFI. Cherny mailed the notice to the address provided by Kersey in his initial interview form. It was received at that address the following day, November 8, and signed for by "J. Annese." Kersey himself did not personally receive the NOFI until November 14, 1995, when he picked the letter up

at the law firm.

On November 25, 1995, Kersey filed a formal complaint of discrimination with the Chief EEO Counselor at Hanscom Air Force Base. By certified letter dated December 27, 1995, the Chief EEO Counselor sent to Kersey a Notice ofDismissal informing him that his complaint had been dismissed as untimely under 29 C.F.R. Sec. 1614.106(b) because it had been filed more than fifteen days after his receipt of the NOFI. This Notice of Dismissal was also mailed to the law firm andsigned for by "Julie Annese." Kersey appealed the dismissal of his complaint to the Equal Employment Opportunity Commission ("EEOC") which, on December 5, 1996, rejected Kersey's appeal and affirmed the dismissal.

On January 31, 1997, the DET denied Kersey's application for unemployment benefits and advised him of his right to seek judicial review of the agency's decision. The decision informed Kersey that his last day to file a complaint seeking judicial review was March 3, 1997. The decision added, "ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT. (See Section 42, Chapter 151A, General laws Enclosed)." The copy of Mass. Gen. L. ch. 151A, Sec. 42 was not, however, enclosed with the opinion. That statute sets forth the procedures and deadlines that govern applications for judicial review, including a requirement that name the Commissioner of DET as a defendant in any complaint and that he serve the complaint on all defendants within seven days after filing.

On March 3, 1997, Kersey filed his first complaint in this Court ("Case I"). In eight counts he alleged age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Sec. 633a (Count I); age discrimination in violation of Massachusetts statutory laws, Mass. Gen. L. ch. 151V, Sec. 1 (Count II); retaliation and harassment (Count III); defamation (Count IV); invasion of privacy in violation of Mass. Gen. L. 214, Sec. 1B (Count V); intentional interference with advantageous economic contractual relations (Count VI); quantum meruit (Count VII); and constitutional

violation of freedom of association (Count VIII).

The next day the plaintiff filed a separate action against the defendants in the Concord Division of the Massachusetts District court seeking judicial review of the DET's denial of unemployment benefits and also asserting two common-law claims arising out of his termination. The complaint, which named the United States Air Force, Collier, and Kessler as defendants, was served on them May 27, 1997. The defendantssubsequently removed the case (Case II) to this Court on June 19, 1997.

Finally, on June 30, 1997, following the EEOC's denial of his request that it reconsider the dismissal of the administrative complaint, Kersey filed a third complaint (Case III) in this Court against the same defendants, which essentially repeated the allegations he had made in his original action. The Courtconsolidated the actions.

ANALYSIS

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving part is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 247-48 (1986). Finally, Fed. R. Civ. P. 56(c) "mandates the entry of summary judgment, . . . upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

A. The ADEA

At the core of all of the plaintiff's claims is the assertion that the defendants terminated him because of his age in violation of the ADEA, 29 U.S.C. Sec. 633a. Having chosen

first to pursue an administrative remedy underthe ADEA, Kersey was required to comply in a timely manner with the regulations governing the filing and processing of administrative complaints. 29 D.F.R. Secs. 1614.103 et seq. These regulations require an aggrieved person (a) to consult with an EEO counselor prior to filing an administrative complaint to try to resolve the matter informally; and (b) to initiate that contact with a counselor within forty-five days of the alleged discriminatory act. 29 C.F.R. Sec. 1614.105(a). Should informal resolution efforts prove unsuccessful, the aggrieved person will receive a NOFI from the EEO counselor informing him of hisright to file an administrative complaint. 29 C.F.R. Sec. 1614.105(d). The employee must then file that complaint within fifteen days of receipt of the notice. 29 C.F.R. Sec. 1614.106(b).

The ADEA claim in Count I (Cases I and III) must be dismissed because Kersey failed to comply with the last of these procedural requirements. The NOFI was mailed on November 7, 1995, and was received at the address had provided the next day. The plaintiff filed his complaint of discrimination more than fifteen days later. Kersey argues that the fifteen-day deadline must run from the day of his "actual" receipt of the notice,as opposed to his "constructive" receipt of it when it was delivered to the law firm. Thus, he insists, because he did not actually receive the notice until November 14, 1995, his filing of the complaint on November 25 fell within the fifteen-day time limit.

It appears that the EEOC has consistently regarded "receipt" to be effective upon delivery of the notice to a person of "suitable age and discretion" at the complainant's address of record. See e.g., Fadil v. National Aeronautical and Space Admin. Agency, EEOC Request No. 05920162 (April 9, 1992) (finding that notice delivered to complaint's place of work and signed for by another employee constituted "receipt of notice" to start limitations period). If a complainant believes that there could be a

problem with the timely receipt of documents mailed to his address of record, he must arrange with the Commission for an alternate method of delivery. Chambers v. Stone, EEOC Request No. 05910895 (March 11, 1992). The Commission's interpretation of its own regulations is entitled to deference. See, e.g., Rao v. Baker, 898 F.2d 191, 195 (D.C. Cir. 1990).

Because Kersey filed his administrative complaint after the applicable filing deadline had expired, it was properly dismissed by the EEOC. Miller v. Runyon, 32 f.3d 386, 388 (8th Cir. 1994) (dismissal of EEOC complaint filed five days after fifteen-day deadline); Rice v. New England College, 676 F.2d 9, 11 (1st Cir. 1982) (dismissal of Title VII complaint filed one day late). But see Kushner v. Glickman, C96-1380-MHP, 1997 WL 419402, at *6 (N.D. Cal. July 7, 1997) (refusing to dismiss complaint despite the fact that the complainant missed the fifteen-day filing requirement on grounds that the complaint missedthe deadline by a "matter of days").

The plaintiff argues that the Court should allow for "equitable tolling" of the time limitation. The First Circuit, however, has taken a narrow view of equitable exceptions to limitations periods. Lopez v. Citiban, N.A., 808 F.2d 905, 906 (1st Cir. 1987); see also Mack v. Great Atlantic and Pacific Tea Co., 871, F.2d 179, 185 (1st Cir. 1989); Kwatowski v. Runyon, 917 F. Supp. 877, 885 (D. Mass. 1996). Where a plaintiff claims excusable ignorance of a filing deadline, a court must first determine whether the plaintiff had actual or constructive knowledge of his rights under the ADEA. If the employee had actual or constructive knowledge of his ADEA rights, there ordinarily can be no equitable tolling based on excusable ignorance. Kale v. Combined Ins. Co. of Am.,861 F.2d 746, 752 (1st Cir. 1988). "Actual knowledge occurs where an employee either learns or is told of his ADEA rights, even if he becomes only generally aware of the fact that there is a statute outlawing age discrimination and providing relief therefor." Id. Moreover, constructive knowledge can be attributed to an employee who has retained

an attorney. Id. Here, of course, the plaintiff himself is an attorney.

Kersey clearly knew of his ADEA rights in order to have proceeded as far as he did in the process. Equitable tolling would only be warranted if he could show either (a) an affirmative misrepresentation by the defendants sufficient to trick or induce him to miss the applicable filing deadline, Mack, 871 F.2d at 185; or (b) circumstances outside of his control that prevented him from filing an administrative complaint within the prescribed time limit, Rao, 898 F.2d at 198. Kersey pleads neither misrepresentation by the defendants nor any facts to indicate that circumstances outside his control prevented him from picking up his mail from the law firm to which he directed it be sent. His ADEA claim is time barred, and Count I (Cases I and III) must be dismissed.

Count III (Cases I and III) of Kersey's complaint alleges retaliatory harassment, an actionable claim under EEOC regulations when made in conjunction with an ADEA claim. 29 C.F.R. Secs. 1614.101, 1614.103(a). However, this claim is subject to the same procedural regulations as a core ADEA claim. For the reasons just set forth,Count III must also be dismissed.

In addition to the federal age discrimination claim brought under the ADEA, the plaintiff also brings a discrimination claim under state law, Mass. Gen. L. ch. 151B, Sec. 1 et seq. (Count II) (Cases I and III). The ADEA provides the exclusive remedy for federal employees alleging age discrimination, preempting all other claims whether based on federal, state, or common law. Purtill v. Harris, 658 F.2d 134, 137 (3d Cir. 1981); Paterson v. Weinberger, 644 F.2d 521, 524.25 (5th Cir. 1981). Consequently, the plaintiff's state age discrimination claim is preempted by the ADEA. The plaintiff contends, however, that his other state claims are separate and distinct from his age discrimination claims, and not preempted. This argument falls somewhat short of the mark because the actions Kersey complains of his defamation, invasion of privacy, and the like, are the same actions which he says

constituted the "age discrimination." These claims are also preempted by the ADEA, and they must be dismissed.

B. CSRA

The defendants further contend that various state statutory and common law claims are also preempted by the Civil Service Reform Act ("CSRA"). The CSRA provides a comprehensive framework for personnel policies governing federal employees. It includes procedures for challenging "prohibited personnel practices." 5 U.S.C. Sec. 2302.

It is beyond dispute that the CSRA preempts state-law challenges to prohibited personnel practices in the federal workplace. Roth v. United States, 952 F.2d 611, 714 (1st Cir. 1991). See also Berrios v. Department of the Army, 884 F.2d 28, 32 (1st Cir. 1989). Collateral district court jurisdiction of state law claims would impede the goals of efficient management and uniformity in the judicial review process that the CSRA was designed to achieve. Berrios, 884 F.2d at 31-32. Indeed, the CSAR bars a wide range of claims ranging from wrongful termination to breach of the covenant of good faith and fair dealing, to infliction of emotional distress, and the like. Taydus v. Cisneros, 902 F. Supp. 288, 292 (D. Mass. 1995) (citing cases).

Kersey's claims of defamation (Count IV) and invasion of privacy under Mass. Gen. L. ch.214, Sec. 1B, (Count V) (Cases I and III), both relate to the publication of an allegedly false performance evaluation. The claims raised in the remaining counts (Counts VI, VII and VIII) (Cases I and III) -- such as his failure to be properly compensated, and adverse relational consequences of his termination -- all relate to his employment or its termination and all constitute "personnel actions." Similarly, plaintiff's claims for failure to provide a professional work environment (Count II) (Case II), and for breach of the covenant of fair dealing (Count III) (Case II) also relate to "personnel actions" within the scope of the CSRA.

The plaintiff argues that, because as a probationary employee he was not entitled to the protections of the CSRA, he must necessarily retain the right to bring the state and common law claims as if the CSRA did not exist. That is not the case. The CSRA permits some appeals by probationary employees to the Merit Systems Protection Board under certain specified grounds. See 5 C.F.R. Sec. 315.806(a). The fact that none of these grounds is available to the plaintiff here does not mean that he has state remedies outside CSRA. In deciding, which federal employees wouldbe covered by the CSRA, Congress did not choose to preserve pre-CSRA rights for those employees not covered by the CSRA. United States v. Fausto, 484 U.S. 439, 448 49 (1987). To have done so would have undermined Congress' own purpose in enacting the CSRA in the first place, namely to replace the "patchwork system" of protection for federal employees "with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." Fausto, 484 U.S. at 445 (1987). "[E]ven where the CSRA provides no guaranteed forum preemption of . . . work-related tort claims is necessary to fulfill congressional intent." Roth, 952, F.2d at 615 (internal quotations and citations omitted). Consequently, Counts IV and VIII (Cases I and III), and Counts II and III (Case II) must be dismissed.

C. The Appeal to the DET

The complaint seeking judicial review of the DET's administrative decision (Count I) (Case II) must be dismissed because the plaintiff failedto file it within the requisite 30 days of mailing the decision, as required by Mass. Gen. L. ch. 151A, Sec. 42. Kersey argues that the 30-day requirement should be waived because he did not receive a copy of the statute when he received the DET decision. Assuming this to be true, it is nonetheless undisputed that the decision itself specifically advises that, "ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT. (See Section 42, Chapter 151A,

General Laws, Enclosed)." Though a copy of the statute may not have been enclosed, Kersey an attorney, was certainly on notice of the relevant statute.

In any event, the decision itself clearly noted that March 3, 1997, was the final day to file a complaint. Kersey did not file his complaint until March 4, 1997, one day past the final deadline. His unemployment appeal is thus time barred and must be dismissed. Garrett v. Director of the Div. of Employment Security, 394 Mass. 417, 418, 420 (1985) (affirming dismissal of unemployment appeal filed one day late).

CONCLUSION

For the reasons stated above, the defendants' motion for summary judgment on all counts of the plaintiff's consolidated complaints is GRANTED. The consolidated cases are DISMISSED with prejudice.

March 12, 1998 George A. O'Toole